

CHRISTINE BRADY)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,050,052
)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

Respondent requests review of the ALJ's finding that claimant had a 29 percent permanent partial impairment to her left upper extremity. Respondent suggests that a

finding that claimant had a 1 percent impairment would be appropriate, arguing that Dr. Poppa's 29 percent rating deviates from what is allowed by the *AMA Guides*.¹

Claimant asks that the Board find the report of Dr. Hopkins was properly a part of the record of the case and, further, asks that the Board find that Dr. Hopkins' rating opinion of 60 percent impairment to the left upper extremity should be adopted. In the alternative, claimant asks that the Board affirm the ALJ's Award, which adopted Dr. Poppa's 29 percent impairment rating.

The issues for the Board's review are:

- (1) May the Board consider the rating report issued by Dr. Hopkins?
- (2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant is employed as a supervisor at the Kansas Neurological Institute. On April 10, 2007, she was treating a client. When she rolled the client toward her to put a clean brief under her, the client continued to roll. Claimant tried to keep the client from falling on the floor but lost her balance and fell backwards. She landed on her left buttock and left elbow and injured her left shoulder. Claimant has had three surgeries on her left shoulder since her accident. She still has consistent pain in her left shoulder. The more she uses her left arm, the more severe the pain gets.

Claimant had previously injured her left shoulder in an automobile accident in 2004. Dr. Kenneth Wertzberger, a board certified orthopedic surgeon, began treating claimant in 2005 for the injuries to her left shoulder suffered in that automobile accident. She was treated with cortisone shots in her shoulder, and in March 2005, Dr. Wertzberger operated on her shoulder, performing a diagnostic arthroscopy, a repair of a SLAP lesion, a subacromial decompression, and an open distal clavicle resection. Claimant did not get her shoulder motion back after the surgery, so Dr. Wertzberger performed a second surgery, a capsular release and lysis of adhesions, on April 28, 2006. After the second surgery, claimant gained all her motion back and was feeling well. In August 2006, Dr. Wertzberger dismissed her from treatment.

Claimant returned to Dr. Wertzberger in July 2007 after having had the accident at work on April 10, 2007. He treated claimant conservatively until September 2007, when he performed surgery on her left shoulder, a biceps tenodesis to reattach the bicep. After that surgery, claimant did not regain her motion in her shoulder. Dr. Wertzberger treated her with a year of physical therapy, and in August 2008 he surgically removed some scar tissue. He

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

treated claimant another 14 months with cortisone shots and physical therapy, but her pain continued. Dr. Wertzberger performed surgery in October 2009 to again remove scar tissue and repair a coracoid impingement. Dr. Wertzberger testified that the final surgery seemed to relieve claimant's symptoms.

On April 20, 2010, Dr. Wertzberger examined claimant for a permanent impairment rating. Although his office note of that date was made a part of the record, it does not contain his impairment rating. Dr. Wertzberger, however, testified that regarding claimant's range of motion, she did not have much impairment. He said that notwithstanding claimant's range of motion, her body had changed and was not the same as it was. "[T]he guides are sorely deficient in certain areas and that is in one of the areas, like with Ms. Brady, range of motion is pretty good, but it doesn't necessarily tell the whole story what she's been through with the five operations."² Dr. Wertzberger did not use any specific devices, such as a goniometer, to make measurements of claimant's range of motion. He indicated that if a person has a full range of motion, he does not need a mechanical device to show him that.

Dr. Michael Poppa examined claimant on October 12, 2010, at the request of the ALJ. He took a history from claimant and reviewed the records of Dr. Wertzberger, Dr. William Hopkins, and St. Francis Health Center. Upon examination, he found claimant had moderate constant crepitation during active range of motion, decreased strength in abduction and external rotation, and decreased range of motion. Using the *AMA Guides*, Dr. Poppa rated claimant's upper extremity impairment at 12 percent for crepitation, 7 percent for decreased strength involving abduction and external rotation, 5 percent for removal of the end of the coracoid process, 2 percent for decreased shoulder flexion, 1 percent for decreased shoulder abduction, and 2 percent for decreased shoulder internal rotation. Utilizing the Combined Values Chart, he calculated claimant's overall upper extremity impairment to be 29 percent at the level of the shoulder.

Neither Dr. Hopkins' medical report nor Dr. Wertzberger's impairment rating report was made a part of the record in this case, and neither physician testified as to claimant's percentage of disability.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

² Wertzberger Depo. at 20. Only three of the surgeries were performed after claimant's work-related accident. The first two surgeries were related to a previous automobile accident.

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

.....
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

.....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Pierce*,³ the Kansas Court of Appeals stated:

We recognize that an impairment rating must comply with the AMA Guides to be considered in determining the claimant's disability. But the Guides are just that—a guide to be used by the physician to arrive at an impairment of function. Two physicians can rate the same injuries using the AMA Guides and arrive at different impairment ratings. It is up to the physician using the AMA Guides to exercise some discretion to arrive at what the physician believes is an accurate impairment for the injuries sustained by the patient.

K.S.A. 44-519 provides in part:

[N]o report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by

³ *Pierce v. L7 Corporation/Wilcox Painting*, No. 103,143, unpublished Kansas Court of Appeals opinion, slip op. at 7, 2010 WL 3732083 (filed September 17, 2010); see also *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

ANALYSIS

(1) Claimant argues that the rating opinion of Dr. Hopkins should be considered as part of the record in this case because it was relied upon by Dr. Poppa in preparing his court-ordered independent medical examination report. Respondent objects to that opinion as it constitutes medical hearsay. The Board agrees. Dr. Hopkins did not testify. Absent Dr. Hopkins' testimony, K.S.A. 44-519 prohibits consideration of his opinions. While another physician may rely upon medical records and reports authored by non-testifying physicians in formulating their own opinions, that does not make the opinions of the non-testifying physicians admissible.⁴ Although the report of Dr. Poppa is admissible without his testimony as a court-ordered independent medical examiner under either K.S.A. 44-510e(a) or K.S.A. 44-516, the opinions of a non-testifying physician who is not court appointed has no such exemption from K.S.A. 44-519.⁵

(2) The percentage of functional impairment for a scheduled injury is to be determined using the 4th edition of the *AMA Guides* "if the impairment is contained therein."⁶ Dr. Wertzberger testified that he did not find the *AMA Guides* to adequately address claimant's injury. Dr. Wertzberger likewise said that even though he found claimant's range of motion to be full and complete and thus not a rateable impairment under the *Guides*, this would not be an accurate measure of her loss. He also said that he had no reason to dispute the opinion of Dr. Poppa, who had examined claimant after Dr. Wertzberger's final examination of her. Like the ALJ, the Board finds the rating opinion of the court appointed examiner, Dr. Poppa, to be the most credible and adopts his 29 percent functional impairment as its own.

CONCLUSION

(1) The rating opinion given by Dr. Hopkins is not a part of the record.

(2) Claimant has suffered a 29 percent loss of use of her left upper extremity at the level of the shoulder.

⁴ *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989); see also *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

⁵ *McKinney v. General Motors Corp.*, 22 Kan. App. 2d 768, 921 P.2d 257 (1996).

⁶ K.S.A. 44-510d(a)(23).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated February 4, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge